

FEDERAL MAGISTRATES COURT OF AUSTRALIA

WU & ORS v MINISTER FOR IMMIGRATION & ANOR [2008] FMCA 929

MIGRATION – Review of decision by Migration Review Tribunal – whether Migration Review Tribunal’s decision affected by jurisdictional error – whether the Migration Review Tribunal failed to measure the visa applicant’s evidence against the regulatory requirements – whether the Migration Review Tribunal erroneously considered whether the visa applicant was confused when providing his residential address to the Department – whether the Migration Review Tribunal made findings without evidence.

Migration Regulations 1994, sch.2; reg.1.15; reg.1.15(1)(c); reg.1.15(1)(c)(i); reg.1.15(3); reg.1.15(4); reg.1.15A; reg.1.15A(2); reg.1.15A(2)(c); reg.15A; cl.115.22; cl.115.211; cl.115.211(1)

Judiciary Act 1903 (Cth), s.39B

Migration Act 1958 (Cth), ss.5(1); 36(2); 65; 65(1); 91R; 91S; s.359A; 474; pt.8 div.2

Su & Anor v Minister for Immigration [2005]FMCA 92

Dien Loan Tran v Minister for Immigration and Multicultural Affairs[1998] FCA 290

First Applicant:	ZHI PING WU
Second Applicant:	ZHI XIAN WU
Third Applicant:	SI KAI WU
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File number:	SYG 241 of 2008
Judgment of:	Emmett FM
Hearing date:	25 June 2008

Date of last submission: 25 June 2008

Delivered at: Sydney

Delivered on: 8 July 2008

REPRESENTATION

Counsel for the Applicant: Mr A. Crossland

Solicitors for the Applicant: Mr B. Bian, City Law

Counsel for the Respondent: Ms L. Clegg

Solicitors for the Respondent: Ms M. Palmer, Sparke Helmore Lawyers

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG 241 of 2008

ZHI PING WU

First Applicant

ZHI XIAN WU

Second Applicant

SI KAI WU

Third Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP

First Respondent

MIGRATION REVIEW TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Introduction

1. This is an application pursuant to s.39B of the *Judiciary Act 1903* (Cth) and Part 8 Division 2 of the *Migration Act 1958* (Cth) (“**the Act**”) for judicial review of a decision of the Migration Review Tribunal (“**the Tribunal**”) dated 21 December 2007 and handed down on 7 January 2008.
2. The first named applicant is a Chinese national who lodged an application on 10 August 2006 for a Remaining Relative (Class BO)

Visa (“**the Visa Applicant**”). The second named applicant is a sister of the first named applicant and is a citizen of Australia. The second named applicant is the sponsor of the first named applicant (“**the Review Applicant**”). The third named applicant is the 16 year old son of the first named applicant and the first named applicant’s ex-wife, all of whom presently reside in China. The Visa Applicant provided various documents in support of his visa application, including a statement dated 21 March 2007.

3. Pursuant to cl.115.211(1) sch.2 of the *Migration Regulations 1994* the visa applicant must be a “*remaining relative*” of an Australian relative (being the review applicant) of the visa applicant.
4. Pursuant to reg.1.15 of the *Migration Regulations 1994* (“**the Regulations**”) an applicant is a “*remaining relative*” of an Australian citizen if the Visa Applicant satisfies the Minister that, relevantly, the Review Applicant is his sister and that he has no “*near relatives*” other than his sister who are usually resident in Australia (reg.1.15(1) (c)(i)). A “*near relative*” is a person who is, relevantly, “*a parent, brother, sister step-parent, step-brother or step-sister of the applicant or of the applicant’s spouse (if any)*”.
5. If the Applicant’s ex-wife is his defacto wife then, relevantly, her father may be a “*near relative*” of the Visa Applicant. The wife of the Visa Applicant remains in China as does her father. If the Visa Applicant remains in a defacto relationship with his ex-wife, he cannot satisfy reg.1.15.
6. Accordingly, the Visa Applicant is not entitled to a visa unless he satisfies the Tribunal that he is no longer in a spousal relationship with his ex-wife.
7. In considering whether the Visa Applicant is in a defacto relationship with his ex-wife, it is necessary to have regard, relevantly, to reg.1.15A(2)(c). Relevantly, reg.15A states as follows:

“(2) *Persons are in a de facto relationship if:*

(c) *the Minister is satisfied that:*

(i) *they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*

(ii) the relationship between them is genuine and continuing; and

(iii) they:

(A) live together; or

(B) do not live separately and apart on a permanent basis”

8. Pursuant to cl.115.22 of sch.2 of the Regulations the criteria for the visa must be satisfied at the time of the decision.

The Delegate’s decision

9. On 9 March 2007, an officer of the Department (“**the Officer**”) conducted an interview with the Visa Applicant. During the interview the Officer, inter alia, explored with the Visa Applicant his and his ex-wife’s residential history in the PRC. The Delegate’s decision record notes that the Visa Applicant told the Officer that his son did not know of his parent’s divorce and meets with his mother once a week.
10. The Delegate noted that the Officer rang the Visa Applicant’s ex-wife’s parents and that the ex-father-in-law answered the telephone and said that his daughter rarely stayed with him and that she usually lived with her child at the Visa Applicant’s sister’s home. The Delegate noted that attempts to contact the Visa Applicant’s ex-wife were “*without success*”. The Delegate noted that the ex-father-in-law’s statement that the Visa Applicant’s ex-wife usually lived with him was put to the Visa Applicant for comment and he was unable to explain.
11. The Delegate had regard to the Visa Applicant’s supplementary statement dated 21 March 2007 in which the Visa Applicant sought to explain further where he and his ex-wife lived. The Visa Applicant said his son lived with him and that he and his ex-wife had agreed that the Visa Applicant would have custody and the right to bring up the son. The Visa Applicant stated that he did not tell his son about the divorce because he was still a child and the Visa Applicant was “*afraid it would do great harm to him.*” The Visa Applicant said that “*in addition, he is going to participate in the junior high school graduation examination. In order not to affect his study, I decide to tell him the truth later on.*”

12. The Visa Applicant's letter stated that the ex-father-in-law's assertion that his daughter lived with the Visa Applicant and her child was false, although the Visa Applicant just acknowledged she would come to visit and look after the child at the Visa Applicant's home. The Visa Applicant said that the father-in-law did not know that the Visa Applicant had been granted custody and the right to bring up the child and that the father-in-law misunderstood that the child was living with his mother.
13. The Delegate was not satisfied that the Visa Applicant and his ex-wife had separated and that the Visa Applicant had the sole care of the child. The Delegate was not satisfied that the Visa Applicant was not in an ongoing de facto spousal relationship and had no overseas near relatives residing in the PRC. Accordingly, the Delegate was not satisfied that the primary criteria in cl.115.211 of sch.2 of the Regulations for the visa were met and, in the circumstances, pursuant to s.65 of the Act refused the application.

The Migration Review Tribunal decision

14. On 24 May 2007, the Review Applicant, being the only eligible applicant for review, lodged an application for review of the Delegate's decision.
15. On 30 November 2007, the Review Applicant's migration agent sent to the Tribunal the following documents:
 - i) Amended translation of Certificate of Title;
 - ii) Receipt of title registration charges;
 - iii) Letter from Guangzhou Bayi Experiment School; and
 - iv) Invoice for insurance for the visa applicant's son
16. The migration agent also sent a letter dated 30 November 2007 setting out the historical residential arrangements of the Visa Applicant and his ex-wife and submitting that the Visa Applicant *"is divorced from his ex-wife, and in whole or substantial care and control of the son"* and therefore the primary criteria are met. The migration agent's letter also submitted that the son of the Visa Applicant satisfied the secondary criteria for the visa.

17. On 4 December 2007, the Review Applicant attended a hearing before the Tribunal at which she gave evidence.
18. The Tribunal noted the written claims made by the Visa Applicant in support of his visa application and the substance of the interview with the visa applicant on 9 March 2007 with an officer of the Department. The Tribunal also referred to the migration agent's submission provided to the Tribunal in support of the review application.
19. The Tribunal noted that it put to the Review Applicant that the Delegate had not been satisfied that the Visa Applicant had genuinely divorced from his spouse and noted the review applicant's response that "*it was impossible*".
20. The Tribunal also took evidence by telephone from the Visa Applicant. The Tribunal explored with the Visa Applicant his residential arrangements and the information he had provided at the interview with the Officer.
21. The Tribunal noted that it asked the Visa Applicant questions about his marriage and contact with his ex-wife and noted his responses. The Tribunal also explored with the Visa Applicant the arrangements with his ex-wife in relation to the upbringing of their son, including financial arrangements. The Tribunal noted that the Visa Applicant said that, prior to August 2007, he and his ex-wife met monthly and that she sometimes came over to his place to meet with their son. When the Tribunal asked the Visa Applicant if they met at other times, the Tribunal found that the Visa Applicant "*became evasive*" and that the Tribunal had to repeat its questions several times. The Tribunal noted that the Visa Applicant eventually said that the ex-wife only came to his home and it was only for a year or so.
22. The Tribunal put to the Visa Applicant inconsistencies in his oral evidence with information provided in the Visa Applicant's interview with the Department, in particular, the fact that his ex-wife's house registration was registered with the Visa Applicant.
23. The Tribunal also explored with the Visa Applicant whether he had yet told his son about the divorce. In particular, the Tribunal put to the Visa Applicant his explanation that he had not told the son because he was

sitting for junior secondary school exams at the time of the divorce. The Tribunal noted that it asked the Visa Applicant if the son was sitting for the exams from 2005 to March 2007 and noted the Visa Applicant's response that, the son was continuing to prepare for exams and did sit exams in 2007.

24. The Tribunal also explored with the Visa Applicant the ex-father-in-law's statement that the ex-wife was living with her son and noted the Visa Applicant's response that his father-in-law "*spoke nonsense*". The Tribunal noted that when it put to the Visa Applicant that the ex-father-in-law would be aware of his daughter's living arrangements, the Visa Applicant again responded that it was nonsense.
25. The Tribunal noted that it must be satisfied that the Visa Applicant was genuinely divorced from his former spouse and no longer in a defacto spousal relationship.
26. The Tribunal noted that it received from the Visa Applicant on 17 December 2007 various documents being; a certificate of title dated April 2007 showing that charges had been levied from 4 May 1997 and that the title holder was the Visa Applicant's ex-wife; an undated receipt from the local transactions registration centre; a statement from the son's school that his tuition fees for term 2 of 2005 and term 1 2006 had been paid by the visa applicant; and an invoice for insurance for the Visa Applicant's son.
27. The Tribunal also noted that evidence from the Review Applicant about the ex-wife which indicated that the ex-wife's parents remained in the PRC.
28. The Tribunal then explored with the Visa Applicant the financial arrangements in relation to the son's schooling and expenses.
29. The Tribunal noted that the issue before it was whether or not the Visa Applicant has any "*near relatives*" remaining in the PRC, those being the parents of his ex-wife with whom he remains in a spousal relationship.
30. The Tribunal accepted that the visa applicant had divorced his ex-wife in 2005, however, noted that it must consider whether the couple maintained a de facto relationship following the divorce.

31. The Tribunal noted that reg.1.15 of the Regulations states that the Visa Applicant must satisfy the Tribunal that he is a “*remaining relative*” of an Australia citizen.
32. In considering whether the Visa Applicant remains in a de facto relationship, the Tribunal referred to *Su & Anor v Minister for Immigration* [2005]FMCA 92 at [30] where the court stated that under reg.1.15:
- “it is for the applicant to make her case, by providing evidence in support any claim that she no longer has a spouse, for example because she is divorced and also has no mutual commitment, no genuine and continuing relationship and that she and her ex-husband did not live together at the time of the application and decision. The application of the regulation 1.15A definition in regulation 1.15 must be considered in light of the evidentiary burden placed on the applicant under regulation 1.15.”*
33. The Tribunal noted that it had concerns about the evidence given by the Visa Applicant to the Department at the interview and the evidence of his ex-father-in-law. In particular:
- i) The Tribunal noted that the ex-wife had removed her house for registration only in May 2007 and the Tribunal did not accept the Visa Applicant’s explanation that this was “*due to an outstanding repair and payments*”. The Tribunal noted that it was not satisfied that the ex-wife could not have removed her household registration earlier if that had been the parties intention.
 - ii) The Tribunal also noted its concerns about the failure of the Visa Applicant to tell his son about the couple’s divorce and was not satisfied by the Visa Applicant’s explanation that he had not done so for an extensive period of time due to the son’s examinations.
 - iii) The Tribunal also had regard to a bank account established in the name of the son showing that the first deposit was made in August 2007. The Tribunal noted the Visa Applicant’s explanation that the bank account was opened after his son started attending boarding school for convenience. However, the Tribunal was not satisfied that it was not opened and presented for the purpose of

strengthening the visa applicant's claims before the Tribunal.

- iv) The Tribunal was also not satisfied that the ex-wife's household registration had not been changed in May 2007 as a result of the concerns expressed by the Delegate in his decision record.
- v) The Tribunal also had regard to the visa applicant's *"apparent confusion about his residential addresses, as described in the review applicant's submission to the Tribunal"* and noted that it *"also raises concerns as to whether the visa applicant continues to reside with his former spouse."*

34. The Tribunal found that as a result of the combination of its concerns and the timing of the events referred to, the Tribunal was not satisfied that the Visa Applicant was no longer in a de facto relationship within the meaning of reg.1.15A with his ex-wife. The Tribunal noted that, in reaching this conclusion, it had considered all material provided by the Visa Applicant in support of his application as well as the oral evidence given to the Tribunal.

35. The Tribunal concluded:

"For these reasons, the Tribunal is not satisfied that the visa applicant's relationship with [his ex-wife] had ceased or that, at the time of application the visa applicant and [his ex-wife] were no longer in a genuine and continuing relationship or that the visa applicant and [his ex-wife] had ceased to have a mutual commitment to a shared life as husband and wife to the exclusion of all others or that the visa applicant and [his ex-wife] did not live together or live separately and apart on a permanent basis. The Tribunal is not satisfied that the visa applicant and [his ex-wife] are no longer in a spousal relationship as defined at r.1.15A of the Regulations. The Tribunal considers [the Visa Applicant's ex-wife] to be the spouse of the visa applicant for the purpose of r.1.15(1)(c)."

The proceeding before this Court

36. The applicants were represented before this Court by Mr Crossland of counsel. Mr Crossland confirmed that the applicants relied on the following grounds:

Ground 1

“In the alternative, the Tribunal failed to undertake a review in that it did not, in fact, conduct an enquiry into whether or not the [Visa Applicant] and [his ex-wife]:

- (a) were no longer in a genuine and continuing relationship;*
- (b) were no longer had a mutual commitment to a shared life as a husband and wife to the exclusion of all others;*
- (c) did not live together or that they lived separately or apart on a permanent basis.*

Particular

The Tribunal’s enquiries were unrelated both to the legal tests it indicated it should apply and to the legal test it should have applied (as to that discrepancy see Ground 1 above).”

Ground 2

“There was no evidence that might allow the Tribunal to make a finding or draw a reasonable inference to the effect that the [Visa Applicant] and [his ex-wife]:

- (a) were no longer in a genuine and continuing relationship;*
- (b) no longer had a mutual commitment to a shared life as a husband and wife to the exclusion of all others;*
- (c) did not live together or that they lived separately or apart on a permanent basis.”*

Ground 3

“In determining whether or not it could be satisfied that the [Visa Applicant] and [his ex-wife]:

- (a) *were no longer in a genuine and continuing relationship;*
- (b) *no longer had a mutual commitment to a shared life as a husband and wife to the exclusion of all others;*
- (c) *did not live together or that they lived separately or apart on a permanent basis.*

the Tribunal took into account irrelevant considerations.

Particulars

The Tribunal erroneously considered:

- (a) *Whether the [Visa Applicant] was confused when giving his residential address to the Departmental Officer.*
- (b) *Whether the Tribunal could be satisfied whether or not a bank account in the Third Applicant's name was opened for the purpose of strengthening the application."*

Ground 4

"There was no evidence for the following findings (and no basis for a reasonable inference to the following effect):

- (a) *that [the Visa Applicant's ex-wife's] failure to change her residential registration was not due to repairs and payments.*
- (b) *that that [the Visa Applicant's ex-wife] could have removed her residential registration at an earlier time.*
- (c) *that the [Visa Applicant's] son had not been preparing for his exams for an extensive period of time;*
- (d) *that the [Visa Applicant] could have informed his son about the divorce before the end of his examinations"*

- 37. Counsel for the applicants confirmed that the other grounds in the application were not relied upon and were withdrawn.
- 38. Counsel for the applicants also sought leave to file in Court an amended application adding a further ground. However, counsel for the applicants withdrew the application for leave to rely on that ground in

the circumstances where it would not be possible for the applicants to succeed on that ground alone without succeeding on any other grounds. If the applicants succeeded on any other grounds, it was not necessary to rely on the amended ground. In any event, counsel for the applicants agreed that the particulars in the amended ground were taken up in support of the other grounds, which are dealt with below.

Ground 1

39. Counsel for the applicants referred the Court to *Dien Loan Tran v Minister for Immigration and Multicultural Affairs*[1998] FCA 290 in support of the proposition that the Tribunal was required to measure the evidence of the Visa Applicant's relationship with his ex-wife against the regulatory requirements. Counsel submitted that the Tribunal had failed to do so. Counsel for the applicants submitted that the Tribunal had merely concluded that it was not satisfied that the Visa Applicant and his ex-wife were no longer in a continuing a genuine relationship; had a mutual commitment to a shared life together to the exclusion of all others; or lived together or lived separately and apart on something other than a permanent basis.
40. Counsel for the applicants referred the Court to reg.1.15(3) and reg.1.15(4) which allowed the Tribunal to have regard to various other matters that may define the relationship, although counsel conceded that that it was not mandatory for the Tribunal to do so. However, counsel for the applicants agreed that it was not mandatory for the Tribunal to do so.
41. A fair reading of the Tribunal's decision makes clear that the Tribunal understood the criteria that the Visa Applicant was required to meet. In particular, the Tribunal was aware that it must consider whether or not the Visa Applicant was still in a de facto relationship with his ex-wife. In considering that issue, the Tribunal had regard to the matters referred to in reg.1.15A(2). The Tribunal had regard to the written and oral evidence provided by the Visa Applicant in support of his application and to the documents provided by him in support of his application.
42. A fair reading of the Tribunal's decision makes clear that the Tribunal put to the Visa Applicant the concerns it had about various aspects of

his evidence relating to his ongoing relationship with his ex-wife and had regard to the Visa Applicant's responses. The Tribunal then identified with particularity those aspects of the Visa Applicant's evidence about which it remained unsatisfied.

43. The concerns the Tribunal had about the Visa Applicant's evidence and, in particular, his explanations to matters of concern put to him by the Tribunal left the Tribunal not satisfied that the Visa Applicant met the criteria required for the visa.
44. Having identified those concerns and matters about which it was not satisfied, the Tribunal concluded that, at the time of application, the Visa Applicant's relationship with his ex-wife had ceased; or that the Visa Applicant and his ex-wife were no longer in a genuine and continuing relationship; or that the Visa Applicant and his ex-wife had ceased to have a mutual commitment to a shared life as husband and wife to the exclusion of all others; or that the Visa Applicant and his ex-wife did not live together or live separately and apart on a permanent basis.
45. The Tribunal's conclusion refers in terms to the relevant words referred to in reg.1.15A(2). In the circumstances, a fair reading of the Tribunal's decision makes clear the Tribunal considered the relevant criteria and made a finding in respect of each of those criteria. Those findings were open to the Tribunal on the evidence and material before it and for the reasons that it gave.
46. Accordingly, ground 1 is not made out.

Ground 2

47. Ground 2 is based on similar complaints as ground 1 and is not made out for the same reasons.
48. In particular, counsel for the applicants submitted that the Tribunal's finding about the "*visa applicant's apparent confusion about his residential addresses*" was not open to it. In support of that contention, counsel for the applicants referred to the submissions of the Review Applicant's agent in which the agent sought to explain the history of the Applicant's and his wife's residences.

49. However, the agent's submission acknowledged that the history of the residential addresses "*is very complicated*".
50. Counsel for the applicants submitted that any confusion that the Tribunal found in relation to the Visa Applicant's evidence about his and his wife's residential history arose from the confused way in which the Tribunal explored this evidence with the Visa Applicant. However, a fair reading of the transcript, which was annexed to the affidavit of Bruce Bian, affirmed 20 June 2008, suggests that any confusion in the mind of the Tribunal was created by the Visa Applicant's unclear evidence in respect of his and his wife's residential history in circumstances where many of the Tribunal's questions were uncomplicated and straightforward.
51. In the circumstances, the Tribunal was entitled to assess the Applicant's evidence with regard to his and his wife's residential history. The Tribunal's finding that the Visa Applicant's evidence "*was confused*" was open to it. It was also open to the Tribunal, having found that the Visa Applicant was confused about his residential addresses, to find that fact a matter of concern in considering whether the Visa Applicant continued to reside with his ex-wife.
52. It was open to the Tribunal to have regard to those concerns in considering whether or not the Visa Applicant continued to be in a defacto relationship within the meaning of reg.1.15A.
53. In fact, the Tribunal was not satisfied of the matters referred to in reg.1.15A(2) based on its concerns and the timing of events referred to above in these Reasons in ground 1.
54. It was for the Review Applicant to satisfy the Tribunal that the Visa Applicant met the statutory criteria in respect of his visa application. Section 65(1) of the Act mandates that if the Tribunal, being the decision-maker, is not so satisfied, it must refuse the application for a visa.
55. Having found that it was not satisfied that the Visa Applicant was no longer in a genuine and continuing relationship with his former spouse; and had not ceased to have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and that the Visa Applicant and his former spouse did not live together or lived

separately or apart on a permanent basis, the Tribunal concluded that it was not satisfied that the Visa Applicant was no longer in a de facto relationship, as defined in reg.1.15A. In the circumstances, the Tribunal found the Visa Applicant's former wife to be his de facto spouse for the purposes of reg.1.15(1)(c). Accordingly, the Tribunal found that the Visa Applicant did not meet the requirements of cl.115.211 of sch.2 and affirmed the decision under review.

56. As stated above in these Reasons, the Tribunal's findings and conclusions were open to it on the evidence and material before it and for the reasons it gave.
57. Accordingly, ground 2 is not made out.

Ground 3

58. **In relation to ground 3(a)**, the Review Applicant contends that the Tribunal erroneously considered whether the Visa Applicant was confused when giving his residential address to the Officer.
59. A fair reading of the Tribunal's decision makes clear that the Tribunal did not have regard to any confusion on the part of the Officer as to the Visa Applicant's evidence in relation to his residential address. Rather, as referred to above in these Reasons in ground 2, the Tribunal found that the Visa Applicant himself appeared confused about his residential addresses in the migration agent's submission to the Tribunal.
60. The information in the submission was given to the Tribunal by the Review Applicant for the purposes of the review application and therefore, did not enliven the obligations of s.359A of the Act.
61. In the circumstances, it was open to the Tribunal to have regard to and evaluate the evidence before it.
62. I reject the contention in ground 3(a) that the Tribunal had regard to any confusion by the Departmental Officer about the Visa Applicant's residential address. The complaint arises from the Tribunal stating the following: *"The visa applicant's apparent confusion about his residential addresses, as described in the review applicant's submission*

to the Tribunal, also raises concerns as to whether the visa applicant continues to reside with his former spouse.”

63. A fair reading of the Tribunal’s decision makes clear that the Tribunal found that the Applicant was confused about his residential address, not the Officer. As discussed in ground 2 above, that finding was open to the Tribunal on the evidence and material before it and for the reasons it gave.
64. **In relation to ground 3(b)**, I reject the Applicant’s contention that such a matter was “*an irrelevant consideration for the Tribunal to take into account*” in circumstances where the Applicant gave that evidence to the Tribunal in support of his claims that he alone had financial responsibility for his son.
65. In the circumstances, it was open to the Tribunal not to be satisfied that the bank account opened in the name of the son had not been opened, other than for the purposes of strengthening the Visa Applicant’s claims before the Tribunal.
66. Accordingly, ground 3 is rejected.

Ground 4

67. Ground 4 contends that there was no evidence for the following findings:
 - a) that [the Visa Applicant’s ex-wife’s] failure to change her residential registration was not due to repairs and payments.
 - b) that that [the Visa Applicant’s ex-wife] could have removed her residential registration at an earlier time.
 - c) that the [Visa Applicant’s] son had not been preparing for his exams for an extensive period of time;
 - d) that the [Visa Applicant] could have informed his son about the divorce before the end of his examinations
68. Counsel for the Applicant submitted that there was no evidence for those findings and no basis for a reasonable inference to be drawn to allow for those findings and that such findings were the basis for the Tribunal affirming the decision under review.

69. Counsel for the First Respondent submitted that the matters referred to in a) to d) above were neither findings nor inferences. Rather, counsel for the Applicant submitted that they were “*observations, reasoning process or thought processes of the Tribunal*” about evidence before it.
70. **In relation to ground 4(a)**, the Tribunal did not accept the Visa Applicant’s explanation that the reason his ex-wife had removed her household registration only as recently as May 2007 was due to outstanding repairs and payments.
71. That explanation was given by the Visa Applicant to the Tribunal in the course of the hearing in response to the Tribunal putting to the Visa Applicant its concerns about why his ex-wife had not removed her household registration until May 2007. The Tribunal had put to the Visa Applicant at the hearing why this explanation was different to that given to the Delegate and whether he had tried to hide from the Delegate the fact that his ex-wife’s household registration was still registered with him at the time of his interview with the Department. The Tribunal noted the Visa Applicant’s further evidence and explanations in respect of its concerns.
72. In the circumstances, the Tribunal was entitled not to be satisfied by that explanation about why the former spouse had not removed her household registration until “*as recently as in May 2007*”. Not having been satisfied by the Visa Applicant’s explanation, the Tribunal was entitled to have regard to the concern it had expressed.
73. **In relation to ground 4(b)**, the Tribunal stated that it was
“not satisfied that there was no opportunity for the visa application or [his ex-wife] to remove [his ex-wife’s] household register from the applicant’s address at an earlier time if there was an intention to do so.”
74. In the light of the exploration by the Tribunal of this matter as referred to in paragraphs 65 and 66 above in these Reasons, it was plainly open to the Tribunal not to be satisfied that there was no opportunity for the ex-wife’s household registration to have been removed from the Visa Applicant’s address at an earlier time if there had been an intention to do so.

75. A fair reading of the Tribunal's decision makes clear that the Tribunal had concerns about the time of the change of the ex-wife's household registration and explored those concerns with the Visa Applicant. In the circumstances, it was open to the Tribunal to remain concerned about those aspects of the Visa Applicant's evidence leading to its lack of satisfaction as to why the household registration was not implemented before May 2007.
76. **In relation to ground 4(c)**, the Tribunal stated that it was not satisfied that the Visa Applicant's son had been preparing for exams for two years and that because of the son's examinations the Visa Applicant could not inform him about the divorce.
77. A fair reading of the Tribunal's decision makes clear that the Tribunal had concerns about the Visa Applicant's explanation that the reason he did not tell his son about the divorce in 2005 was because he was preparing for exams. The Tribunal noted that the Visa Applicant said at the hearing that he told his son about the divorce in March 2007.
78. The Tribunal noted that when it asked the Visa Applicant why his son could not be told about the divorce the Visa Applicant stated that the son was sitting for "*junior secondary school exams and did not want to affect his son's results*". The Tribunal then noted that it asked the Visa Applicant if the son was sitting for the exams from 2005 to March 2007 and noted the Visa Applicant's response that "*he was preparing for the exams and sat the examinations in 2007*". In light of that evidence, it was open to the Tribunal to remain concerned about whether or not the exam period extended for that period of time and, to have concerns about the Visa Applicant's explanation, in those that he could not inform the son about the divorce due to the son's examinations.
79. Accordingly, it was open to the Tribunal not to be satisfied about the Visa Applicant's explanation as to why he had not informed the child about the divorce.
80. **Ground 4(d)** raises the similar issues and questions as are referred to above in these Reasons at ground 4(c).
81. A fair reading of the Tribunal's decision makes clear that the Tribunal put to the Visa Applicant its concerns about his evidence and evaluated

his responses and explanations. It was open to the Tribunal to remain unsatisfied on the evidence and material before it about those matters in respect of which it expressed concerns.

82. Further, it was open to the Tribunal, based on those concerns, to remain unsatisfied that the Visa Applicant met the required criteria for his visa. As stated above in these Reasons, in light of the Tribunal's lack of satisfaction that the criteria required for the subclass 115 Remaining Relative visa was met, the Tribunal was bound to affirm the decision under review, pursuant to s.65(1) of the Act.
83. Accordingly, ground 4 is not made out.

Conclusion

84. A fair reading of the Tribunal's decision makes it clear that the Tribunal understood the claims being made by the Visa Applicant; explored those claims with the Visa Applicant; had regard to all material provided in support; and, made findings based on the evidence and material before it. Those findings of fact were open to the Tribunal on the evidence and material before it and the reasons it gave. A fair reading of the Tribunal's decision makes clear that the Tribunal reached conclusions based on its considerations of the evidence and material before it and applied the correct law in reaching those conclusions.
85. In the circumstances, the Tribunal complied with its obligations under the statutory regime in the making of its decision, including the conduct of its review.
86. The Tribunal's decision is not affected by jurisdictional error and is therefore a privative clause decision. Accordingly, pursuant to s.474 of the Act, this Court has no jurisdiction to interfere.
87. The proceeding before this Court is dismissed with costs.

I certify that the preceding eighty-seven (87) paragraphs are a true copy of the reasons for judgment of Emmett FM

Associate: S. Kwong

Date: 8 July 2008